

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO.: WA-12BNCVC-112-08/2023

ANTARA

1. NG CHIN TUAN
(No. K/P: 840524-14-5975)
2. NG LEE WERN
(No. K/P: 880405-14-5418)
3. NG CHIN KEONG
(No. K/P: 800318-14-5353)
4. NG LEE MIN
(No. K/P: 811119-14-5952)
5. NG TECK HUAT
(No. K/P: 490314-08-5401)
6. TEH KIM CHOW
(No. K/P: 500917-08-5474)

Berniaga di bawah nama dan gaya
SYARIKAT SIN HIN ENGINEERING
(No. Perniagaan: 000358977-X)

... PERAYU-
PERAYU

DAN

MULTIPLE BUILDERS SDN BHD
(No. Syarikat: 11182-W)

... RESPONDEN

[Dalam Perkara Guaman Sivil No.: WA-B52NCVC-165-04/2022
Dalam Mahkamah Sesyen di Kuala Lumpur

Antara

MULTIPLE BUILDERS SDN BHD
(No. Syarikat: 11182-W)

... PLAINTIF



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... DEFENDAN-
DEFENDAN

GROUNDS OF DECISION
Appeal (after full trial)

Abstract

[1] This case showcased how one law firm acting not for one but three parties in a Property's sale and purchase transaction can transform a simple conveyancing matter into a nightmare. The documentary evidence shows how the law firm handled all its common clients in the transfer of Property, including dating two Sale and Purchase Agreements (SPA) for the same property transaction on the same date. While both SPA are dated 21 February 2017, evidence suggests the first SPA was indeed dated 21 February 2017, but the second SPA was executed and stamped on 9 July 2019 but backdated. This inconsistency raises significant legal and ethical concerns, including:



- a) The validity and enforceability of the backdated agreement;
- b) Potential misrepresentation and lack of transparency;
- c) Implications for contractual timelines and obligations;
- d) Questions about party consent and knowledge;
- e) Evidentiary challenges and credibility issues; and
- f) The role of one common solicitors acting for the parties as the Purchaser's Solicitors, the Purchaser's Financier's Solicitors and the stakeholder solicitor for the Vendor that did not have any solicitors acting for them.

[2] This inconsistency is central to understanding the dispute and could substantially impact the legal interpretation of the entire transaction. It necessitates careful examination of the circumstances surrounding both agreements' creation and execution.

[3] For ease of reference, the Appellant is referred to as the Purchaser while the Respondent is the Respondent. The common solicitors would be referred to as the Common Solicitors in their roles to the Purchaser, Purchaser's Financier and the Vendor.

Introduction

[4] The dispute arose when two SPA were dated 21 February 2017, with the difference with and without the Landowner. The 1st SPA was executed by the Vendor and Purchaser dated 21 February 2017 but unstamped ("1st SPA"), while the 2nd SPA was executed by the Vendor, Purchaser and Landowner, also dated 21 February 2017 but stamped on 9 July 2019 ("2nd



SPA”). The Vendor, who is the Plaintiff and Respondent in the appeal herein, claimed that the 2nd SPA is dated 21 February 2017. The Purchaser, who is the Defendant and the Appellant herein, is claimed to have breached the clauses in the SPAs by not adhering to the timelines concerned.

[5] The Vendor claimed that parties executed the 2nd SPA on 21 February 2017. In applying this date as the date of the 2nd SPA, the Vendor claimed that the Purchaser was in breach of the terms and conditions of the 2nd SPA, namely, their delay in paying the Balance Purchase Price (“BPP”) despite the Certificate of Completion and Compliance (“CCC”) being forwarded to them via email on 17 April 2018.

[6] The Purchaser contends that the 2nd SPA dated 21 February 2017 is the 2nd SPA signed by parties on 9 July 2019 based on the date of stamping on the 2nd SPA. Based on this actual date of the 2nd SPA of 9 July 2019, the Purchaser did not breach any of the terms and conditions of the 2nd SPA.

[7] The Vendor claimed late payment interest was due to the Purchaser’s delay in payment of the BPP. The Purchaser’s counterclaim is based on the 1st SPA dated 21 February 2017 for damages on the Vendor’s delay in furnishing the Memorandum of Transfer, Instrument Document of Title and the respective documents for transfer (“MOT & IDT”) from 21 February 2017 until 11 September 2019, together with reimbursements of payments made by the Purchaser for the utility charges of the Property.

[8] The Learned Sessions Judge (“LSJ”) allowed the Vendor’s claim by awarding RM309,519.99 and the Purchaser’s counter-claim was dismissed. This appeal concerns only one issue that is when was the actual SPA signed



to bind parties to the terms of the agreement? The focus of the appeal is on the errors in law and, in fact, of the two SPA dated the same date, the spirit and intention of the sale and purchase of the Property, whether there are reciprocal promises and breach of the SPA and the computation of the timelines stipulated in the SPA.

Appellate Intervention

[9] The law on appellate intervention is substantial where intervention is warranted when there is serious misdirection by the trial judge that the decision is plainly wrong. The courts uphold a high threshold for appellate intervention in factual findings. There are compelling reasons for appellate courts to intervene when the trial judge makes serious misdirection.

[10] Insufficient judicial appreciation of evidence as in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* (2004) 4 CLJ 309 FC where the Federal Court established that "insufficient judicial appreciation of the evidence" is consistent with the "plainly wrong" test. This principle relates to the trial judge's process of evaluating evidence. When a trial judge seriously misdirects themselves in appreciating the evidence, it amounts to being "plainly wrong," justifying appellate intervention.

[11] Decisions that cannot be reasonably explained or justified as in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* (2021) 3 MLJ 622 FC emphasised that appellate courts should intervene when the trial judge's decision is 'plainly wrong' in the sense that it cannot be reasonably explained or justified. A serious misdirection that leads to an inexplicable or



unjustifiable decision would fall under this category, necessitating intervention.

[12] While *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd* (2018) 2 MLJ 177 FC stressed the irrelevance of an appellate court's differing opinion, it implicitly suggests that errors in applying legal principles to factual findings could warrant intervention. Serious misdirection often involves misapplying legal principles to facts. The Federal Court in *Ong Leong Chiou* (supra) noted that findings of fact repugnant to common sense ought to be disturbed. Serious misdirection that leads to findings contrary to common sense would fall under this category, warranting appellate intervention.

[13] Failure to consider material evidence, as in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng* (2020) 12 MLJ 67 FC criticised broad, general applications of the "plainly wrong" test without identifying errors. This implies that when a trial judge seriously misdirects themselves by failing to consider material evidence, appellate intervention is justified if this error is specifically identified.

[14] In this case, I find that appellate intervention is warranted as the decision of the LSJ falls under all the instances above. What is most damaging is the LSJ's failure to consider the Purchaser's defences, arguments, and evidence brought before the trial judge, where the LSJ is seen only as considering the Vendor's side of the story. I find the judgment of the Federal Court in *Sarmiina Sdn Bhd v Gerry Ho & Ors* (2023) 5 MLRA 159 FC case to be the most telling for the appellate intervention in this case.



[15] In allowing the appeal by setting aside the High Court decision, the Federal Court in *Sarmiina* (supra) found that the trial judge failed to address the issue of whether there was a valid written claim in compliance with s 128 of Customs Act 1967 (“CA 1967) but instead questioned the fact that the appellant was the agent of the consignors. The judge also failed to consider whether the respondents should refer the matter to the magistrate under s 128(3) CA 1963 to determine if there was a valid claim to release the goods. The non-consideration by the trial judge on s 128 CA 1963 prejudiced and caused a miscarriage of justice to the consignors. The trial judge is found to have given insufficient judicial appreciation of the evidence, which amounted to a plainly wrong decision that warranted intervention. In this case, the reasons for the LSJ’s insufficient judicial appreciation are expounded as follows.

Background Dispute

[16] The dispute concerns a sale and purchase transaction for a property of a 4-storey shop office on land identified as Geran No. 17258, Lot No. 48549, Mukim Batu, Daerah Kuala Lumpur (“the Property”). The parties involved are the Vendor/Respondent/Plaintiff, namely Multiple Builders Sdn Bhd, while the Purchaser/Appellants/Defendants are Syarikat Sin Hin Engineering, and the Landowner is Kua Lan. A Joint Venture Agreement and Power of Attorney dated 5 October 2012 existed between the Vendor and Landowner, allowing the Vendor to develop the Property. In 2016, the Vendor and Purchaser began negotiations on the sale of the Property at the selling price of RM2,650,000.00. The Purchaser obtained a loan offer from Public Bank Berhad (“PBB”) on 23 November 2016 to finance the purchase.



[17] The Vendor claims RM357,553.95 from the Purchaser, the late payment interest for the BPP under the SPA. According to the Vendor, the Purchaser was required to pay the BPP of RM2,385,000.00 within three months of receiving the CCC, allegedly received on 17 April 2018. The Vendor contends that the Purchaser only paid part of the balance (RM265,000.00) on 20 December 2019, leaving a balance of RM2,120,000.00 which was only paid on 11 March 2020. As a result, the Vendor claims late payment interest on these delayed payments per the agreement terms.

[18] The total purchase price was paid in three stages: the RM265,000.00 deposit was paid sometime around 27 December 2016, the RM265,000.00 differential sum was paid on 9 November 2019, and the RM2,120,000.00 balance was paid on 12 March 2020. The Vendor claimed late payment interest, which the Purchaser disputed. The Purchaser counterclaimed for damages due to the Vendor's delay and for refund of electricity-related payments.

[19] The Purchaser denies the Vendor's claims and asserts that the CCC was only received on 11 September 2019, not 17 April 2018, as alleged by the Vendor. Furthermore, the Purchaser argues that the Vendor delayed in providing the necessary documents for the loan disbursement. The Purchaser also contends that the Vendor waived its right to claim late payment interest by not demanding it before accepting the final payment of BPP.



[20] In their counter-claim, the Purchaser alleges that the Vendor breached the SPA by promptly failing to deposit the transfer documents with the Common Solicitors and delaying the provision of documents required for the loan disbursement. Consequently, the Purchaser is claiming damages for a delay of 933 days in providing transfer documents, which caused a delay in the Property registration. The Purchaser seeks compensation for loss of potential interest on the deposit, loss of potential profit from property sale, and loss of rental income. Additionally, the Purchaser claims specific damages totalling RM12,130.00 for various utility charges paid on behalf of the Vendor.

Issues to be Tried

[21] The court will determine the timing of the relevant document deliveries, including the CCC and the MOT & IDT. It will assess whether the Vendor is entitled to claim the late payment interest from the Purchaser as per the SPA, and if so, for what period and amount. The court will evaluate if there were delays by the Vendor in providing the relevant documents and how these may have affected the Purchaser's payment obligations. It will also consider whether the Vendor breached the SPA, causing delays in Property transfer and sale completion. Finally, the court will address the Purchaser's counterclaim for damages arising from the alleged delays.

What Transpired in Trial

[22] Vide the 1st SPA dated 21 February 2017, the Vendor sold to the Purchaser the Property at RM2,650,000.00. Under Item 2(a) of the Second



Schedule of the SPA, the Purchaser was required to pay the BPP of RM2,385,000.00 within three months from the date of receipt of the CCC by the Common Solicitors, namely M/s. Farid Wong & Wee.

[23] The Common Solicitors act for the Purchaser as the Purchaser's Solicitors in receiving the CCC from the Plaintiff as Vendor via email on 17 April 2018. Therefore, the BPP was due by 17 July 2018. The Purchaser only paid part of the BPP of RM265,000.00 on 12 December 2019 and the remaining BPP of RM2,120,000.00 was paid on 11 March 2020.

[24] The Vendor claims late payment interest of RM268,165.47 for the period 18 July 2018 to 12 December 2019, and RM41,354.52 for the period 13 December 2019 to 11 March 2020, totalling RM309,519.99. The Vendor contends there was no delay on their part in providing the MOT & IDT, and that the Purchaser delayed paying the BPP, resulting in them being obligated to pay late payment interest under the SPA. It is also contended that the Purchaser misinterpreted Clauses 2 and 3(b) of the SPA. It was highlighted that Clause 2 only requires the MOT & IDT to be deposited for stamp duty adjudication, not registration. The Vendor further asserts that there is no implied term that the 3-month period in Item 2(a) Schedule Two in the SPA starts once the MOT & IDT are deposited.

[25] The Purchaser disputes by arguing that there is an implied term that the 3-month period to pay the balance purchase price under Item 2(a) does not start until the MOT & IDT are deposited with the Common Solicitors. The Common Solicitors only received the MOT and title documents on 11 September 2019, not in April 2018, as claimed by the Vendor. Since the



Vendor delayed in providing the MOT & IDT, the Purchaser was also behind time for 120 days in providing the Purchaser's Financier the Vendor's Letter of Undertaking ("LOU"), which entitles them to an extension of time. The purchaser argued that standard conveyancing practice is the obligation to pay the BPP does not arise until the MOT & IDT are provided. Moreover, the Vendor's claim for late payment interest is estopped because the claim was only made after the Purchase Price was settled and the sale and purchase transaction of the Property concluded. With the delay, the Purchaser counterclaims for the refund of RM12,130.00 for the electricity deposit paid to Tenaga Nasional Berhad ("TNB").

The Grounds of Judgment

[26] The LSJ's decision was based on interpreting the SPA clauses, assessing witness evidence, and finding that the Plaintiff (Vendor) had proven its case on a balance of probabilities. At the same time, the Defendant (Purchaser) failed to prove their counterclaims. The LSJ found that the Vendor was entitled to claim interest of RM357,553.95 from the Purchaser under Item 2(a) of the Second Schedule of the SPA.

[27] The LSJ rejected the Purchaser's argument that there was an implied term that the 3-month period to pay the BPP only started after the MOT & IDT were deposited with the Common Solicitors. Based on the interpretation of the SPA clauses, no such implied term existed.

[28] The LSJ found that the Vendor did not breach the SPA or cause a delay in registering the transfer and completing the SPA. The Purchaser



knew relevant facts regarding the Joint Venture Agreement and how the MOT & IDT were obtained. The Purchaser's counterclaim for damages was dismissed due to the alleged 933-day delay in providing the MOT & IDT. The Defendant's claim for RM12,130.00 for an electricity supply deposit was dismissed as this claim is premature since the Purchaser had not complied with their obligation under Clause 4(b) of the SPA to notify the electricity company of their change of ownership.

Focus on the SPA Terms

[29] The clauses in the SPA that form the dispute are re-produced below:

NOW IT IS HEREBY AGREED AS FOLLOWS:-

1. In consideration of the sum of Deposit paid by the Purchaser stipulated in Item 1 of the Second Schedule to the account of the purchase price of the said Property stipulated in Item 5 of the First Schedule hereto (hereinafter referred to as "the Purchase Price") to be paid by the Purchaser(s) to the Purchaser(s)' Solicitors as Stakeholders in the manner and within the times as set out in the Second Schedule hereto, the Vendor(s) hereby agrees to sell and the Purchaser(s) hereby agree to purchase the said Property hereto free from all charges and encumbrances with vacant possession together with Certificate of Completion and Compliance ("CCC") but subject to all conditions of title whether expressed or implied in the Issue Document of Title to the said Property at the Purchase Price and subject to the terms and conditions hereinafter appearing.
2. Simultaneously with the execution of this Agreement, the Landowner(s) and/or the Vendor(s) shall cause the Landowner(s) to execute the Memorandum of Transfer in the favour of the Purchaser(s) (hereinafter referred to as "the said Transfer") and forthwith deposit the same with the Purchaser(s)' Solicitors who are authorised by the parties hereto to proceed only with the adjudication of stamp duty payable of the said Transfer and shall not present the same for registration until the Balance Purchase Price has been paid as set out in the Second Schedule hereto or until the Purchaser(s)' Financier's Solicitors has confirmed in writing that the Purchaser(s)' Loan Sum has been approved and upon the Purchaser(s)' Financier furnishing to the Vendor(s) a letter of undertaking to release the Purchaser(s)' Loan Sum on or before the Completion Date toward payment of the Balance Purchase Price (hereinafter referred to as "the Financier's LU") and upon payment by the Purchaser(s) of the difference between the Balance Purchase Price and the Purchaser(s)' Loan Sum to the Vendor(s)' Solicitors as Stakeholders.
- 3.(a)(i) In the event the said Property is charged to the Vendor(s)' and/or Landowner(s)' Financier as stated in Item 1(b) of the Third Schedule hereto, the Vendor(s) shall procure the Redemption Statement from the Vendor(s)' Financier and deliver the same to the Purchaser(s)' Solicitors within Fourteen (14) Days from the date of receipt by the Purchaser(s)' Solicitors of a request to do so by the Purchaser(s)' Solicitors or the Purchaser(s)' Financier's Solicitors as the case may be, failing which the Vendor(s) shall allow the Purchaser(s) an extension of time which corresponds with the period of such delay without interest to pay the outstanding Balance Purchase Price as set out in the Second Schedule hereto.

[30] Clause 1 of the SPA outlines the basic terms of the Property sale transaction. The Purchaser agrees to pay a deposit, which their solicitors



hold as stakeholders. The Vendor commits to selling the Property, while the Purchaser agrees to purchase it. The Property will be sold free of charges and encumbrances, with vacant possession, including a CCC. The sale is subject to the title conditions in the IDT and all other terms and conditions specified in the agreement.

[31] Clause 2 of the SPA details the process for handling the MOT in the property transaction. Upon signing the agreement, the Landowner and/or Vendor must execute this MOT in favour of the Purchaser and deposit it with the Purchaser's Solicitors. The Common Solicitors are authorised to handle the stamp duty adjudication for the transfer. The transfer document cannot be registered until certain conditions are met. These conditions include either the full payment of the BPP as outlined in the Second Schedule, or confirmation of the Purchaser's loan approval along with an undertaking from the Purchaser's Financier to release the loan amount by the Completion Date.

[32] If the Purchaser uses financing, they must pay any difference between the BPP and their loan amount to the Vendor's Solicitors, who will hold these funds as stakeholders. This clause ensures that the Property transfer is documented correctly and that all financial obligations are met before the transfer is officially registered. The differential sum was given to the Common Solicitors who acted as the Vendor's Solicitors Stakeholders, and was paid and received by the Vendor on 12 December 2019.

[33] Further into the contents of the SPA, Clause 4 states that:



- 4(a) The Vendor(s) shall construct and complete the construction of the Shop Office and deliver vacant possession of the said Property together with Certificate of Completion and Compliance to the Purchaser(s) within a period of twenty four (24) calendar months from the date of this Agreement ("the due delivery date") Provided Always that in default of which the Vendor(s) shall pay to the Purchaser(s) interest at the rate of Eight per centum (8%) per annum on the Purchase Price calculated on a day to day basis from the expiry of the due delivery date to the actual date of delivery of vacant possession of the said Property together with Certificate of Completion and Compliance ("CCC") by the Vendor(s) to the Purchaser(s).
- (b) The Purchaser shall within *FOURTEEN (14) days* from the date of delivery of vacant possession by the Vendor to notify the local authority, Tenaga Nasional Berhad, Syabas / Puas, Indah Water Konsortium Sdn. Bhd., etc., for the change of ownership of the Property.

[34] Clause 4(a) and (b) outline the key obligations of both the Vendor and the Purchaser in the property transaction. The Vendor is responsible for constructing and completing the Shop Office and then delivering vacant possession of the Property to the Purchaser and the CCC. This must be done within 24 calendar months from the agreement date, known as "the due delivery date". Suppose the Vendor fails to meet this deadline, they must pay interest to the Purchaser at 8% per annum on the Purchase Price, calculated daily from the day after the due delivery date until actual delivery.

[35] On the Purchaser's side, once they receive vacant possession, they have 14 days to notify various authorities about the change of ownership. These authorities include the local authority, electricity provider (TNB), water providers (Syabas/Puas), sewerage service provider (Indah Water Konsortium Sdn. Bhd.), and any other relevant authorities. This clause ensures that both parties have clear responsibilities and timelines, with penalties for the Vendor if they fail to deliver on time and specific post-possession duties for the Purchaser.



SECOND SCHEDULE
(which is to be taken, read and construed as an essential part of this Agreement)

(CLAUSE 1 : PAYMENT OF THE PURCHASE PRICE)

The Purchase Price referred to in Item 5 of the First Schedule hereto shall be paid at the times and in the manner as follows:-

Item 1: PAYMENT OF DEPOSIT

Simultaneously with the execution of this Agreement, the Purchaser(s) shall pay to the Vendor(s) a sum of Ringgit Malaysia Two Hundred And Sixty Five Thousand (RM265,000-00) only being 10% of the Purchaser Price (hereinafter referred to as "the Deposit") and as part payment towards the Purchase Price which the Vendor(s) hereby acknowledges receipt.

The Purchaser hereby covenants and agrees with the Vendor(s) that the Purchase Price shall be paid at the time and in the manner as follows:-

- (i) Prior to the date of this Agreement, the Purchaser(s) has paid to the Vendor(s) the sum of Ringgit Malaysia Seventy Thousand (RM70,000-00) only ("Earnest Deposit");
- (ii) Simultaneously upon the execution of this Agreement, the Purchaser shall forthwith deposit with the Vendor a sum of Ringgit Malaysia One Hundred And Ninety Five Thousand (RM195,000-00) only ("Balance Deposit");

The Earnest Deposit and the Balance Deposit totaling the sum of Ringgit Malaysia Two Hundred And Sixty Five Thousand (RM265,000.00) only equivalent to 10% of the Purchase Price shall constitute the deposit sum ("Deposit Sum") and as part payment towards the Purchase Price; and

Item 2: PAYMENT OF BALANCE PURCHASE PRICE

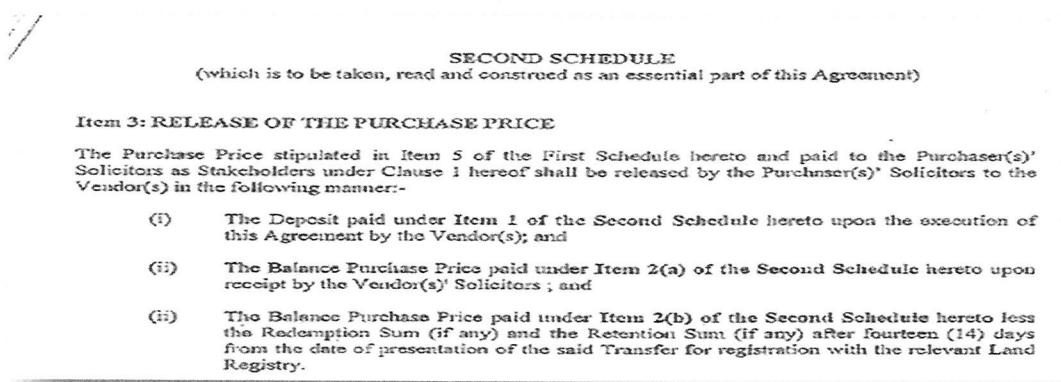
- (a) The Balance of the Purchase Price amounting to Ringgit Malaysia Two Million Three Hundred And Eighty Five Thousand (RM2,385,000-00) only (hereinafter referred to as "the Balance Purchase Price") shall be paid by the Purchaser(s) to the Vendor(s) and/or the Purchaser(s)' Solicitors as Stakeholders within Three (3) calendar months from the date of receipt by the Purchaser's Solicitors copy of "CCC" (hereinafter referred to as "the Completion Date") Provided that the construction of the Shop Office have been completed together with CCC duly issued thereof AND FURTHER Provided Always if the Purchaser(s) are unable for whatsoever reason(s) to pay the Balance Purchase Price within the Completion Date, it is hereby agreed by the parties hereto that the Completion Date shall be automatically extended for a further One (1) calendar month from the Completion Date (hereinafter referred to as "the Extended Completion Date") with interest at the rate of Eight per centum (8%) per annum calculated on a daily basis on the balance outstanding sum is payable by the Purchaser(s) commencing on the day next following the expiry of the Completion Date which interest shall be paid contemporaneously with the Balance Purchase Price.
- (b) The parties hereto agree that upon the request by the Purchaser(s)' Solicitors or the Purchaser(s)' Financier's Solicitors as the case may be, the Vendor(s) shall, within fourteen (14) Days from the date of being requested to do so by the Purchaser(s)' Solicitors or the Purchaser(s)' Financier's Solicitors as the case may be, furnish to the Purchaser(s)' Financier an undertaking to refund the Purchaser(s)' Loan Sum in the event the said Transfer in favour of the Purchaser(s) cannot be registered for any reason whatsoever thereby resulting in the Charge in favour of the Purchaser(s)' Financier being unregistered and unenforceable, failing which the Vendor(s) shall allow the Purchaser(s) an extension of time which corresponds with the period of such delay without interest to pay the outstanding Balance Purchase Price as set out in the Second Schedule hereto.



[36] The Second Schedule of the SPA above outlines the payment structure for the Property purchase. The total Purchase Price is divided into a Deposit and a Balance. The Deposit, totalling RM265,000.00 (10% of the Purchase Price), is split into an earnest deposit of RM70,000.00 paid before the agreement and a Balance Deposit of RM195,000.00 due upon execution of the agreement. The BPP of RM2,385,000.00 will be paid within three calendar months from the date the Common Solicitors receive the CCC. This date is referred to as the "Completion Date". If the Purchaser cannot pay by the Completion Date, they automatically receive a one-month extension, during which interest at 8% per annum is charged daily on the outstanding balance.

[37] The clause also includes a provision for the Vendor to provide an undertaking to refund the Purchaser's loan sum if the Property transfer can't be registered. If the Vendor fails to provide this undertaking within 14 days of a request, the Purchaser gets an interest-free extension to pay the BPP, equal to the period of the Vendor's delay. This Second Schedule ensures a clear payment structure and protects both parties' interests.

[38] Item 3 states on the release of the Purchase Price:



[39] It outlines how the Common Solicitors, acting as Stakeholders, will release the Purchase Price to the Vendor. The release is to be done in the following manner (as per sub-item (i) where the Deposit, as specified in Item 1 of the Second Schedule, is to be released to the Vendor immediately upon execution of the agreement by the Vendor. Under sub-item (ii), The BPP is released in two scenarios. The first scenario is as detailed in Item 2(a) of the Second Schedule, the BPP is to be paid by the Purchaser to the Vendor within three calendar months from date of receipt of the CCC by the Purchaser's Solicitors where an automatic extension would be given for a further one calendar month at 8% interest p.a. calculated daily.

[40] The second scenario of the payment of the BPP under sub-item (iii) is as described in Item 2(b) of the Second Schedule where the Vendor must furnish the LOU within 14 days upon request, to the Purchaser's Financier, the undertaking to refund the Purchaser's Loan Sum if the transfer to the Purchaser cannot be registered and the charge being unregistered and unenforceable. If the Vendor fails to give this mandatory LOU, the Vendor must allow the Purchase an extension of time for the delay, without interest, to pay the outstanding BPP.

Stark observation

[41] From the parties' arguments at the lower court, I find that despite the allegation that the Vendor issued the CCC by email on 17 April 2018, everybody kept quiet about the progress of the sale of the Property. It was not until 11 July 2019 (almost fifteen months later), when the Vendor gave the MOT & IDT to the Purchaser, that the progress of the sale was



reactivated. The glaring oddity is that the Vendor did not ask for the BPP to be paid despite the CCC being given. Indeed, the non-action reflects that either the CCC was not provided or the parties have not reached the contractual deadline for the BPP payment.

[42] The observation gathered from the correspondences in that gap of almost fifteen months is that parties had abandoned the 1st SPA. As rightly pointed out by the Purchaser, the Vendor did not have any authority to act as the Vendor to sell the Property on 21 February 2017 since the Landowner was still the registered owner (see land search on 11 September 2019 at Enc. 6 pg. 259-261). The last land search on 18 March 2022 (see Enc. 6 pg.79-82) showed that the Property was transferred not from the Vendor but from the Landowner directly to the Purchaser on 24 December 2019. The Vendor merely registered its private caveat over the Property from 28 November 2012 until it was removed on the date it was registered under the Purchaser's name. Form 14A proved the direct transfer with the Vendor stated in the Joint Venture Agreement dated 5 October 2012 with the Landowner. Another striking observation is that Form 14A stated that the Vendor had received the BPP (RM2,650,000.00) from the Purchaser vide the SPA dated 21 February 2017. Form 14A was dated 8 October 2019. The Vendor received the BPP from the Purchaser only on 20 December 2019 for RM265,000.00 and the balance of RM2,120,000.00 on 11 March 2020. This statement in Form 14A is untrue.

[43] Another observation is that the Vendor's Company Resolutions were dated after the 1st SPA on 21 February 2017. The Resolutions were signed on 9 October 2019, inter alia, to approve the disposal of the Property to the



Purchaser. The dates would reflect that the Vendor had no authority to sell the Property to the Purchaser when the 1st SPA was signed on 21 February 2017. The Resolutions could only be signed very much later, after more than two years, to ratify the sale since, on 21 February 2017 as the Vendor did not have the authority to sell. The true colour of conduct of the Common Solicitors was shown when the 2nd SPA was backdated before the Resolutions were obtained.

[44] The Vendor had no locus and no consent to sell from the landowner. The Latin phrase '*Nemo dat quod non habet*' means 'no one can give what they do not have' rings a bell. This *Nemo Dat* legal principle states that a person who does not have adequate ownership of goods or property cannot transfer the ownership of those goods or that property to someone else.

[45] By executing the 2nd SPA sometime on 9 July 2019, the Vendor acted on the 2nd SPA by forwarding the MOT & IDT to the Purchaser on 11 July 2019. The 2nd SPA, dated 9 July 2019, was applied by both parties, including the Landowner. All the documents corresponded to 9 July 2019. Parties did not raise the delay issue when they corresponded with each other from 9 July 2019 until 14 February 2020. The CCC was delivered by hand to the Purchaser's solicitors on 11 September 2019. I found it amiss when the Vendor hand-delivered the CCC to the Purchaser one year after it was emailed. If the Vendor said that the CCC was emailed earlier, why was the CCC again sent to the Purchaser? My reasonable conclusion and finding is that it was because parties were enforcing the 2nd SPA, which parties acted upon after 9 July 2019.



In Analysing the Issues

[46] Based on the parties' submissions, I find that there is only one determinative issue to be reached, namely, whether the parties had delayed their obligations to comply with the timelines stipulated in the SPA.

Delay in complying with timelines of the SPA

[47] The Vendor claims for late payment interest of RM309,519.99 calculated from 17 July 2018, where the LSJ has awarded this claim. The LSJ found that there is no implied term in the SPA that the 3-month period for payment in Item 2(a) of the Second Schedule depends on the MOT & IDT being deposited with the Common Solicitors. The LSJ interpreted Clause 2 of the SPA to mean that the simultaneous execution of the MOT with the SPA and its deposit with the solicitors was only for adjudication of stamp duty. The registration of the MOT would occur upon settlement of the BPP or confirmation of loan approval. The LSJ viewed Clause 3(b) of the SPA as merely requiring the deposit of the IDT with the solicitors for release upon settlement of the BPP or loan approval confirmation. Further, the LSJ found there was no intention by the parties to include an implied term that the 3-month period in Item 2(a) of the Second Schedule would not begin until the MOT & IDT were deposited.

[48] The Vendor argued that the SPA terms and conditions must be interpreted according to plain language. They said they did not delay depositing the MOT & IDT and the CCC with the Common Solicitors. The Common Solicitors received the CCC on 17 April 2018, not 11 September 2019, as the Purchaser claimed.



[49] The Vendor contended that the Purchaser knew these documents had to come directly from the Landowner's solicitors, not the Vendor. The Purchaser took its risk of any delay and must bear the consequences, including paying the late payment interest. The Vendor did not breach any reciprocal obligations and therefore ss 53 and 55 of the Contracts Act 1950 ("CA 1950") do not apply. The Purchaser also did not challenge the validity or legality of the SPA during the transaction. The LOU was not sent late, as the LOU was provided within the 14-day timeframe specified in the SPA.

[50] With great respect, I find the Vendor's arguments unacceptable. The interpretation of Clause 2 of the SPA means that the transfer of the Property shall not be presented for registration until the BPP has been paid. This condition is as set out in the Second Schedule. It is not until the Purchaser's Financier solicitors confirm in writing that the loan has been approved and upon the Purchaser's Financier furnishing the LOU to release the loan sum on/before the Completion Date towards the payment of the BPP and also upon payment by the Purchaser of the differential sum to Common Solicitors as stakeholders. These three conditions must be fulfilled before the Purchaser can pay the BPP.

[51] Parties are tied by the terms and conditions in the SPA with reciprocal obligations. That makes parties subjected to ss 53 and 55 CA 1950 where parties' obligations are subjective to the other party's first to fulfil their part of the specified terms.

[52] In referring to *Sejati Education Sdn Bhd v S3M Development (Sabah) Sdn Bhd* (2016) 6 CLJ 710 CA, the Janab's Key To Practical Conveyancing and Islamic Banking (2nd Ed., 2013) is worth recapitulating:



In any conveyancing transaction of land in Malaysia, the solicitors must ensure that the obligations of the vendor and purchaser are clearly spelt out in the sale and purchase agreement and in addition they have to stipulate the mechanism to fulfil such obligations. For example, the vendor is obliged to give good title to the land; transfer and give vacant possession of the property within the time specified in the contract; and perform all other obligations incidental to the transfer within the specified time. The purchaser is obliged to pay the purchase price within the specified time; accept the transfer free from encumbrance; and performs all other obligations incidental to the transfer within the specified time.

[53] The Purchaser secured a bank loan from Public Bank Berhad (“PBB”) to purchase the Property. It is a fact that the differential sum (of the loan with the BPP) of RM265,000.00 was released to the Purchaser’s Financier Solicitors on 9 November 2019 and subsequently to the Vendor on 12 December 2019. After that, the BPP of RM2,120,000.00 was disbursed by the Purchaser’s Financier (PBB) to the Purchaser’s Financier Solicitors (the Common Solicitors), who then transmitted to the Vendor on 12 March 2020.

[54] Item 2(b) of the Second Schedule makes it clear that the required LOU shall be furnished within 14 days from the requested date, failing which the Vendor shall allow the Purchaser extension for the delay without interest to pay the outstanding BPP set out. This term states that an automatic extension is free of interest charge when the Vendor fails to furnish the LOU within that stipulated time. It is for apparent reason that the delay by the Vendor cannot be penalised on the Purchaser with late payment interest.

[55] Item 3 para (iii) in the Second Schedule of the SPA also makes it clear that the BPP payable under Item 2(b) of the Second Schedule



aforementioned is only payable after deduction of any Redemption Sum (if any) and Retention Sum (if any) within 14 days from the presentation date of the MOT for registration.

Validity of which SPA

[56] The 1st SPA was dated 21 February 2017 between parties without the Landowner. The 2nd SPA was also dated 21 February 2017 but was executed sometime in July 2019 between the Vendor, Purchaser and Landowner, but backdated to February 2017. The stamping of the 2nd SPA showed the date as 9 July 2019.

[57] Although it is not an issue that the 2nd SPA was backdated from 9 July 2019 to 21 February 2017, I want to highlight the stark oddities that parties had acted as if the 2nd SPA was dated 9 July 2019. The conduct and progression of the transfer of the Property must be scrutinised in terms of its minute details. The starting point of the dispute was when the CCC was said to have been emailed to the Common Solicitors on 17 April 2018. No proper delivery of the CCC was proven to satisfy Clause 18 of the SPA. Save for a without-prejudice letter dated 5 June 2018 by the Vendor to the Purchaser (see Enc. 8 pg. 35), nothing progressed after the issuance of the CCC by email. The world was frozen in a time zone from April 2018 until July 2019, a total lockout of activities for 15 months.

[58] If parties had abided by the terms of the 1st SPA, upon the delivery of the CCC and receipt by the Common Solicitors by email on 17 April 2018. In that case, the ball will start rolling for the Purchaser to settle the BPP



on/before 17 July 2018 with an automatic extension of one month until 17 August 2018. But, nobody raised the issue of payment of BPP or delay until one year after 17 July 2019. The Vendor and Purchaser had not acted because the CCC was emailed by “*Ibsconstruct*” to the Common Solicitors in their capacity as the Developer/Nominee/Vendor Solicitors under the Joint Venture Agreement, not under the 1st SPA (see Enc. 8 pg. 33-34 & Enc. 6 pg. 33-34). The Common Solicitors then forwarded the CCC to the Landowner’s Solicitors namely M/s. Hong & Co who acted for the Landowner (see Enc.6 pg. 150). Hence, there is confusion about the role(s) of the Common Solicitors in wearing many hats for the sale and purchase transaction of the Property.

[59] With this finding of fact that it was “*Ibsconstruct*” that emailed the CCC to the Vendor (through the Common Solicitors) on 17 April 2018, it is a settled fact that the Purchaser only received the CCC on 11 September 2019, as argued by the Purchaser. The development of the case becomes apparent with the parties after 11 September 2019, acting following the timeline stipulated in the 2nd SPA until the registration of the MOT & IDT and release of the BPP. The parties undoubtedly worked on the 2nd SPA, which took effect on 9 July 2019, based on the stamping date. In concurring with *FKJV (M) Sdn Bhd v Mode Circle Bhd* (2012) MLJU 751 HC, this Court is cautious on the backdating of the SPA where the 2nd SPA is seen to be backdated as an attempt to gain the undue advantage to the Common Solicitors. All things fell into the right places save for the performances by the Purchaser towards the 1st SPA when the Purchaser acted proactively after its execution on 21 February 2017.



[60] This court, therefore, finds that the 2nd SPA dated 21 February 2017 was, in fact, executed sometime around 9 July 2019 based on the parties' actions and documents.

Entitlement to the late payment interests of the BPP

[61] Going through the development of this conveyancing matter until the Property was registered under the Purchaser's name, the Vendor did not cry out to claim the late payment interest on the purported late BPP payment. The Common Solicitors wanted to make peace with its clients (Vendor and Purchaser) by retracting the demand notice and stating that parties would settle amongst themselves. Nothing fruitful came to pay, hence this action.

[62] The first demand letter for the BPP issued by the Vendor was dated 14 February 2020 and then 16 March 2020, and it was addressed to the Common Solicitors. The Vendor's demand letters dated 5 June 2020 and 19 June 2020 were directed to the Purchaser and copied to the Common Solicitors. The Purchaser responded vide the letter from M/s. Tey & Co dated 24 June 2020, demanding clarification of the issues they raised. The Common Solicitors replied to the Purchaser's Solicitors' letter in their undated letter stating that the Vendor would tentatively withdraw its letter dated 19 June 2020 and resolve the matters with the Vendor directly.

[63] M/s. Tey & Co then requested a written confirmation and clarification on the Vendor's purported tentative withdrawal of the demand for the alleged late interest payments in the letter dated 30 June 2020. The terms of the 1st



SPA stipulated an implied term that the Purchaser's obligation to pay the BPP was subject to the Vendor first depositing the MOT & IDT with the Purchaser's Solicitors. The Common Solicitors replied vide their letter dated 3 July 2020 to confirm that the Vendor agreed to withhold the interest claim matters. The Common Solicitors enclosed the Vendor's letter dated 24 June 2020 of their agreement to withhold.

[64] The word "withhold" means to hold back from action or to refrain from granting, giving or allowing (see the online Merriam-Webster Dictionary). When the Vendor stated its agreement to withhold, it meant it agreed not to demand for the late payment interests.

[65] As depicted earlier, parties acted on the 2nd SPA when the Vendor forwarded the MOT & IDT to the Common Solicitors after the fifteen-month frozen period. The Vendor caused the delay, which should not penalise the Purchaser for paying any late payment interests (see *Tieh Boon Tuck v Evonne Lee Pei Chen & Anor* (2014) 1 MLJ 882 CA). Echoing similar sentiment on judicial notice under s 56 Evidence Act 1950 ("EA 1950"), the prominent standard conveyancing practice is observed. Parties knew that the purchase of the Property was financed by a loan obtained from PBB by the Purchaser. The terms in the 2nd SPA state that BPP would only be released once the Financier finalises and accepts the loan documentation. The Vendor furnished its company documents late and did not forward the MOT & IDT when requested. The cumulative effect of the delay resulted in the loan being released late, whereby the BPP was also paid late after the settlement of the redemption sum. The Purchaser could not cause the delay. The Purchaser cannot be penalised for any delay not caused by them.



[66] It must be remembered that the Vendor never asked for BPP and the late payment interest before they forwarded the MOT & IDT. The Vendor only furnished the IDT & MOT and CCC on 11 September 2019, as per the letter of confirmation by the Purchaser's solicitors in their letter dated 13 September 2019 (Enc. 6 pg 262). The letter stated the Purchaser's Solicitors received the original IDT, the duly executed MOT and the CCC.

[67] The Vendor never claimed against the Purchaser because all terms were fulfilled. The vendor was informed of the Purchaser's borrowing, and the Vendor has been aware of the BPP payment since 2017 when the Purchaser secured the loan to pay off the BPP. The Vendor knew they had not done so; hence, they did not ask for the BPP and payment for any late payment interests.

[68] The fundamental term of the SPA for the payment of BPP is that the Purchaser Financier releases its loan amount to pay the BPP when the borrower Purchaser fulfils its terms under the loan agreement and other security documents, including forwarding documents of the Vendors. 'The circumstances at the material time where the delay in forwarding the LOU by the Vendor to the Purchaser Financier hampered the release of the loan which cumulatively delayed payment of the BPP to the Vendor (see *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* (2007) 2 MLJ 746 CA).

[69] Upon executing the 2nd SPA, the Vendor handed over the company documents to the Common Solicitors. Form 19G was also signed to remove



the private caveat entered by the Vendor to secure the Purchaser's interest and pending the Property transfer registration. Without the Vendor's Company Resolutions, the sale transaction cannot materialise as the Vendor has yet to secure its authority to sell. The Vendor's Company Resolutions were only issued on 9 October 2019 while the loan had been secured three years ago in 2016 (see Enc. 6 pg 239). The Purchaser was ready to pay the Purchase Price with the loan obtained. However, because the Vendor could not furnish the Purchaser's Financier with the resolutions, Vendor LOU and the MOT & IDT within the timeframe in the 2nd SPA, the release of the loan took longer than the standard practice.

[70] The delay in obtaining the Vendor LOU for the Purchaser's Financier was substantial. The first request for the Vendor LOU was made orally on 15 October 2019 and the Vendor furnished the Vendor LOU only on 11 November 2019. The Purchaser's Financier rejected this first Vendor LOU, and a second request was officially made in writing on 20 December 2019 (Enc. 6 pg 49). This same Purchaser's Financier's Solicitors (the Common Solicitors) confirmed the differential sum of RM265,000.00 was paid on 12 December 2019. The second LOU given on 30 December 2019 was defective and again rejected by the Purchaser's Financier. Only on 11 February 2020 was the third Vendor LOU accepted (Enc. 8 pg 30) by PBB, but the Purchaser then was in a dilemma because they had yet to receive the documents from the Vendor. Until and unless the Purchaser's Financier receives the documents, the Purchaser cannot get its loan as the Purchaser's Financier will not release it.



[71] As of 12 February 2020, there is a delay of 120 days if calculated from the date of the 1st SPA. The BPP has been paid on 12 March 2020. Based on computation, the CCC was received on 11 September 2019, and there was also a delay in issuing the LOU by 120 days. In the Second Schedule of the SPAs, the Completion Date is automatically extended (refer to Item 2(b)). It is stipulated that if the Vendor fails to furnish the Vendor LOU to the Purchaser's Financier within 14 days of the request, the Vendor shall allow the Purchaser an extension of time corresponding with the delay period without interest to pay the outstanding BPP.

[72] The spirit and intention of SPAs must be in a context where the embodied terms and conditions cannot be viewed in isolation. The SPAs are to realise the Property. The SPA dictated the obligations of the Vendor and Purchaser that they must fulfil. Both SPAs dictated that the BPP would be paid within three months of receipt of the CCC. The 1st SPA cannot be followed as the dateline had already lapsed even before the 2nd SPA was signed sometime around 9 July 2019. Parties treated the 1st SPA as not applicable by their conduct. The 1st SPA is void and unenforceable since no consent was obtained from the Landowner/ Proprietor for the Vendor to enter into the 1st SPA. The subsisting Joint Venture Agreement dated 5 October 2012 entered by the Vendor with the Landowner gives no power to the Vendor to sell the Property but only to develop the same. At that material time, with no authority to sell, the Vendor acted as if they had the authority to sell when the 1st SPA was signed.



[73] Believing all that, the Purchaser signed the 1st SPA and carried out all obligations. The Vendor cannot later claim that because the CCC was given to the Purchaser, they now have the right to claim for the late payment interest. The Vendor had no authority to sell the Property if the 1st SPA was applied. That was why the 2nd SPA was entered into by parties and the Landowner to give authority to sell to the Vendor. By backdating the 2nd SPA to the same date as the 1st SPA, the Vendor steered clear of any breach of the SPA since the Vendor enforced the 2nd SPA. The Vendor cannot claim they are not in breach of the 1st SPA but argued that the Purchaser is in breach. The 2nd SPA is the SPA in force, and by applying it, the Purchaser did not violate any of the terms in the 2nd SPA.

Counter-claim

The RM12,130 paid by Purchaser on behalf of Vendor for electricity supply application for the property

[74] The Purchaser counter-claimed in this action for expenses incurred in fulfilling its obligations under the 1st SPA, namely opening the TNB account for the Property by paying deposits to TNB and paying the stamp duty of the documentation in the sum of RM12,130.00. Since the ownership of the Property in 2018 was still under the Vendor's name, the account and deposit were paid under the Vendor's name.

[75] Now that the Property has been registered in the Purchaser's name, the TNB account under the Vendor's name must be terminated first, for the



deposit paid (by the Purchaser) can be refunded to the Vendor. Since the refund would go to the Vendor, the Purchaser wanted the Vendor to refund the payment they made on the Vendor's behalf at that time.

[76] As it is known that the Purchaser made the payments on behalf of the Vendor then, the Purchaser is entitled to be refunded since the Purchaser is now the registered owner and not the Vendor.

Damages for Vendor's breach on delay to furnish MOT & IDT from 21 February 2017 until 11 September 2019 (933 days)

[77] Since the 2nd SPA is the SPA acted by parties and the Vendor's claim for late payment interests on the late payment of the BPP is dismissed, this counter-claim is also dismissed. Similarly, the Purchaser did not take action on the purported breach of the Vendor's delay in forwarding the MOT & IDT. Therefore, they cannot now ask for damages, which is an afterthought, and they are estopped by conduct (see *Lai Hee Sang v Pun Hai Chin* (2016) 6 MLJ 434 CA). The equity doctrine of laches and acquiescence would apply, albeit the Vendor kept quiet for nearly fifteen months before claiming the late payment interest. Even after demanding, the Vendor withhold its claim and cannot after that demand for it again. A person uncertain of his right to action shows he is unsure if he has such a right. This court of equity has always refused its aid to stale demands when a party has slept on his rights. This principle protects those who are proactive in asserting and protecting their rights rather than those who are negligent or inactive. Individuals aware of their legal rights and take timely action to enforce them are more likely to



receive legal protection or remedies. Conversely, those who delay asserting their rights or ignore legal matters may be disadvantaged.

[78] The maxim "*Vigilantibus et non dormientibus jura subveniunt*" (the law aids the vigilant and not those who sleep on their rights) is a fundamental legal principle that emphasises the importance of timely action in protecting one's legal rights. The maxim encourages people to be vigilant about their legal affairs and to act promptly when their rights are threatened or violated. It underscores the importance of being proactive and attentive in legal matters rather than passive or negligent. This principle underlies various legal concepts like limitation periods and the doctrine of laches, serving to prevent stale claims and encourage prompt enforcement of rights.

[79] After all, the Purchaser cannot approbate and reprobate. While arguing the Vendor is not entitled to the late payment interests since the 1st SPA is inapplicable, the Purchaser cannot now argue the 1st SPA is applicable on their part to claim for damages for late delivery of the MOT & IDT. If there is a delay under the 2nd SPA, the delay is to be calculated from 9 July 2019 until 11 September 2019, which is only 64 days. But, with the delay of 64 days, the Purchaser did not show what losses they suffered due to the delay. No evidence was adduced on the losses suffered, including the alleged loss of interest income from depositing RM265,000.00 in the fixed deposit account, loss of profit from the sale of the Property, or loss of rental income. The Purchaser's allegation is pure speculation and arbitrary without any supporting evidence. The English case principle in *Bonham Carter v Hyde Park Hotel* (1948) WN 89 applies.



[80] With my analysis of this case, I find it necessary to disturb the LSJ's findings; I find the LSJ, in general, failed to consider important facts, particularly the existence of 2 SPA bearing the same date, 21 February 2017. The LSJ did not consider all the facts on the sale and purchase. More scrutiny is needed of the terms and conditions of the SPA regarding the conduct of parties and the documents presented before the court. The LSJ's decision must be disturbed and set aside for the reasons I stated earlier.

Decision

[81] This appeal is allowed whereby the Vendor's claim is dismissed and the counter-claim is allowed only for the sum of RM12,130.00 to be paid to the Purchaser with costs of RM7,000.00.

Dated 15th August 2024



Arziah binti Mohamed Apandi
Judicial Commissioner
Kuala Lumpur High Court
NCvC 8



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Cases referred:

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors (2004) 4 CLJ 309 FC

Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors (2021) 3 MLJ 622 FC

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Bonham Carter v Hyde Park Hotel (1948) WN 89

Acts/Laws referred:

Section 128 of Customs Act 1967

Sections 53 and 55 of the Contracts Act 1950

Section 56 Evidence Act 1950



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Articles referred:

"Legality of Backdating Agreements" dated 12 January 2022, Tommy Wong
(<https://mahwengkwai.com/lawyers/tommy-wong/>)



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